86-1435

Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEMOULAS SUPER MARKETS, INC.,
Petitioner,

v.

LARRY HARRIMAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTIONS PRESENTED

1. Whether the exercise of general jurisdiction by the State of Maine over a Massachusetts corporation based primarily on passive purchasing from a Maine corporation violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the exercise of specific jurisdiction by the Maine Court is appropriate where the nonresident Defendant's contacts with the state neither arise out of nor are clearly related to the Plaintiff's cause of action.

PARTIES

Plaintiffs/Respondents Larry Harriman and Annette Harriman are husband and wife and reside in Auburn, Maine. Defendant/Petitioner Demoulas Super Markets, Inc. is a Massachusetts Corporation doing business in Massachusetts and New Hampshire under the "Demoulas" and "Marketbasket" trade names. Allied entities include DSM Realty Trust, Delta and Delta Realty Trust, Valley Properties, Inc. and Northland Properties, Inc. They also do business only in Massachusetts and New Hampshire.

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PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

The Petitioner Demoulas Super Markets, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court sitting as the Law Court, entered in the above-entitled proceeding on December 5, 1986.

OPINION BELOW

The final opinion of the Maine Supreme Judicial Court appears in the appendix to this petition, and is reported in Vol. 518 of the Atlantic Reporter 2d at page 1035. Also appearing in the appendix is the initial opinion of the Maine Superior Court, Androscoggin County, dated March 5, 1986.

JURISDICTION

On December 5, 1986, the Maine Supreme Judicial Court, sitting as the Law Court, vacated the judgment

of the Maine Superior Court, Androscoggin County, dismissing the action for want of personal jurisdiction over the Defendant. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Due Process Clause of the 14th amendment to the United States Constitution and the Maine "Long-Arm" Statute.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Maine Revised Statutes, Title 14, § 704-A provides in pertinent part:

> 1. Declaration of Purpose.
>
> It is declared, as a matter of legislative determination, that the public interest demands that the State provide its citizens with an effective means of redress against nonresident persons who, through certain significant minimal contacts with this State, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this State and persons of other states.

This Section, to insure maximum protection to citizens of this State, shall be applied so as to assert jurisdiction over nonresident Defendants to the fullest extent permitted by the Due Process Clause of the United States Constitution, 14th amendment.

2. Cause of Action.

Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

* * * *

I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

* * * *

STATEMENT OF THE CASE

On August 26, 1979 the Respondent, Larry Harriman, was making deliveries for F.R. Lepage Bakery, a Maine corporation, when he slipped and fell at the Tewksbury, Massachusetts warehouse of the Petitioner, Demoulas Super Markets, Inc. The Respondents filed an action in the Maine Superior Court, Androscoggin County, alleging negligence in the maintenance of Defendant's warehouse. The Petitioner moved to dismiss the complaint for lack of personal jurisdiction pursuant to M.R.Civ.P. 12(b)(2). On March 5, 1986 the Maine Superior Court granted the Petitioner's motion on the ground that the Petitioner's contacts with the State of Maine were insufficient to allow the court to assert jurisdiction over the person of the Petitioner consistent with due process. The Respondent appealed. On December 5, 1986 the Maine Supreme Judicial Court vacated the Superior Court's judgment of dismissal.

The record before both the Maine Superior Court and the Maine Supreme Judicial Court sitting as the Law Court was supplemented by deposition testimony, affidavits, documentary evidence and admissions. The following facts are derived from those materials, and references herein are to the record submitted to the court for consideration on the jurisdictional issues.

The Petitioner, Demoulas, is a Massachusetts corporation engaged in the grocery business. (Deposition of David Lane at 5-6.) Demoulas Super Markets, Inc. is not registered to do business in the State of Maine, and does not now maintain, nor has it ever maintained an office in the State of Maine. (Lane at 32-33.) Demoulas does not have an authorized agent in the State of Maine, nor does it maintain a telephone in the State. Demoulas does not own or lease property in Maine. Demoulas does not hold bank accounts in the State of Maine. It has never shipped products to Maine. It has never been involved in a lawsuit in Maine, nor has it utilized Maine law in order to defend a claim brought against it in any other jurisdiction. (Lane at 33-34.)

Although several companies based in Maine do sell products to Demoulas, in no case does Demoulas enter into contracts in the State of Maine, pick up goods from suppliers in Maine, or solicit business from them. Demoulas purchases from over 70 suppliers. Fewer than 10% are from the State of Maine. (Deposition of Clarissa Samuels at 4; Defendant's Responses to Request for Production of Documents propounded by the Plaintiff.) Transportation and delivery is solely in the hands of the suppliers. Demoulas' fleet of trucks is used only to deliver products between its stores in New Hampshire and Massachusetts. (See Deposition of Clarissa Samuels at 17; Deposition of David Lane at 11.)

Demoulas has only one purchaser, Clarissa E. Samuels, for its Bakery Department. Samuels operates solely out of the Demoulas offices and warehouse in Tewksbury,

Massachusetts. All personal contacts with F.R. Lepage are solely in the Tewksbury warehouse. Samuels does not go to Maine to meet with F.R. Lepage or other suppliers. F.R. Lepage solicited Demoulas for *their* business. (Deposition of Clarissa Samuels at 25-28.)

The bulk of F.R. Lepage's business with Demoulas involves servicing the individual Demoulas stores with F.R. Lepage brands. Deliveries are made directly to the Demoulas stores and the entire marketing approach is controlled by F.R. Lepage. Demoulas merely makes space available to F.R. Lepage on the bakery aisles. Those spaces are filled and serviced by F.R. Lepage employees. (Samuels at 6-7.)

F.R. Lepage also delivers to Demoulas materials packaged under Demoulas' private labels. F.R. Lepage is solely responsible for the product until it is delivered to the Demoulas warehouse in Tewksbury, Massachusetts. Everything, including the packaging, is done by F.R. Lepage. Demoulas does not touch the product until it is unloaded by the F.R. Lepage driver at the Demoulas warehouse, and risk of loss for the product rests with Lepage until the product is accepted by Demoulas. (Deposition of Clarissa Samuels at 12-17 & 26.)

Demoulas does not advertise on Maine television or radio stations. Demoulas does advertise in one Southern Maine newspaper which has a New Hampshire circulation as well. Less that .8% of the overall daily circulation of those newspapers in which advertising is placed by Demoulas reaches Maine.

The Maine Supreme Judicial Court held that it could exercise "specific jurisdiction" over the Petitioner under the Maine "Long-Arm" Statute. The Court did not analyze whether the Respondents cause of action "arose out of" or "related to" the Petitioner's contacts with the forum. Instead, the Court ruled that due process permits

Maine's assertion of personal jurisdiction over a Defendant when the following three questions are affirmatively answered:

> (1) does the forum state have a legitimate interest in the subject matter of the action; (2) should the Defendant by his conduct reasonably have anticipated litigation in the forum state; and (3) would the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice"? 518 A.2d at 1036.

The Maine Supreme Judicial Court found that the Petitioner had established extensive, long-term business relationships with Maine suppliers, and by advertising in Maine to attract Maine customers it had invoked the benefits and protections of Maine law. "These purposeful activities provided Demoulas reasonable notice of the probability of being haled into court in Maine." 518 A.2d at 1039.

The Petitioner respectfully contends that the Maine Courts can not constitutionally assert either "general" or "specific" jurisdiction over it, and therefore brings this petition.

REASONS FOR GRANTING THE WRIT

I. THE EXERCISE OF "GENERAL JURISDICTION" BY MAINE COURTS OVER THE PETITIONER BASED PRIMARILY ON PASSIVE PURCHASING FROM A MAINE CORPORATION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND IS CONTRARY TO THE DECISIONS OF THIS COURT IN *ROSENBERG BROS. & CO. v. CURTIS BROWN CO.*, 260 U.S. 516 (1923) AND *HELICOPTEROS NACIONALES DE COLOMBIA, S.A. v. HALL*, 466 U.S. 408 (1984).

Although the decision itself is unclear, it appears that the Maine Supreme Judicial Court held that the Petitioner's contacts within the State of Maine were of such a continuous and systematic nature that it could exercise "general" as well as "specific" jurisdiction. A review of

Demoulas' contacts with the state of Maine demonstrates that its activities do not constitute the kind of continuous and systematic general business activities which are required in order to allow a Court to assert general jurisdiction over a nonresident Defendant. Compare *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) with *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

At the outset, it is useful to examine both the limits that the Constitution places upon the power of the state to assert *in personam* jurisdiction over a nonresident Defendant, and also the distinction between "general" and "specific" jurisdiction. Due process requirements for *in personam* jurisdiction over a nonresident corporate defendant are satisfied when that nonresident corporate defendant has "certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). These due process limitations arise out of two related but distinct principles. First, an assertion of jurisdiction over a nonresident corporate defendant must be "fair" such that the corporation can reasonably anticipate being haled into court in the forum jurisdiction. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. at 297. Additionally, the Due Process requirement of minimum contacts insures that: "the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in the federal system." 444 U.S. at 292. Thus, the concept of due process includes not only considerations of fairness, but also considerations of federalism.

These concepts underlying the minimum contacts test have given rise to an analysis of jurisdiction in terms of concepts of "general jurisdiction" and "specific jurisdiction". "General jurisdiction" is usually applied to a situation in which the nonresident defendant's contacts with

the State are sufficient to support jurisdiction even in an unrelated action. "Specific jurisdiction" is applied to a situation in which the Defendant's forum contacts are few but the cause of action arises directly from them. *See* "Review Essay", California Law Review, Vol. 72: 1328 at 1337. Compare *Helicopteros Nacionales de Colombia, supra,* and *Keeton v. Hustler Magazine,* 465 U.S. 770 (1984).

In this case, Demoulas Super Markets was merely a purchaser of products from various suppliers located in the State of Maine. Its actions were therefore passive, and it did not in any way "reach out" to the State of Maine to establish contacts with its various suppliers. Similarly, its activity with the products, once received, was to distribute them through a retail store chain; thus, its sales activities were purely local, and not directed toward a nationwide marketing campaign. Respondent's employer, F.R. Lepage, solicited Demoulas for their business, rather than Demoulas soliciting Lepage. All personal contacts with F.R. Lepage were solely at Petitioner's Tewksbury, Massachusetts warehouse. Thus, although Petitioner had contacts with residents of the State of Maine, it had no contacts or activities *within* the State.

The Maine Supreme Judicial Court incorrectly relied upon Demoulas' purchasing relationship with F.R. Lepage to assert general jurisdiction. The Court stated:

> Demoulas' conduct in entering into and maintaining its long-standing contractual relationships for the purchase of grocery products from Lepage and other Maine businesses provided sufficient basis upon which to assert jurisdiction. The United States Supreme Court has stated in *Burger King* that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the conse-

> quences of their activities." (citation omitted.) 518 A.2d at 1037.

The Maine Supreme Judicial Court's reliance on *Burger King* is not only misplaced, but is directly contrary to the specific holding of this Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. at 418, in which this Court stated:

> In accordance with *Rosenberg*, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.

The fact pattern of the present case is much more analogous to the facts in *Helicopteros* than *Burger King*. In *Burger King*, the defendants sought out the plaintiffs and entered into a complex twenty-year contract with a national chain. In exchange for receiving a lease, market research, advertising assistance, ongoing training in restaurant management, and similar support services, they agreed to submit to the national organization's exacting regulation of almost every aspect of their operations. The defendants also agreed contractually to litigate any disputes with Burger King in Florida. In *Burger King*, the Court went on to note that the constitutional touchstone remains whether the defendant purposely established "minimum contacts" with the forum state and a determination of whether the defendant had purposefully availed himself of the privilege of conducting activities *within* the forum state, thus invoking the benefits and protections of its laws. *Burger King*, 105 S. Ct. 2174, 2183, citing to *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-1240, 2 L. Ed.2d 1283 (1958).

This case is substantially different from *Burger King*. The relationship between the Petitioner and the Respondent's employer is very simple. Petitioner merely pur-

chased from F.R. Lepage. Demoulas never dictated the content of F.R. Lepage's products which it purchased, nor did it inspect the Lepage plant or Lepage products. Lepage had sole control over the manufacture of the products in question, and was in fact solely responsible for the product until it was delivered at the Demoulas warehouse in Massachusetts. Thus, the Maine Supreme Judicial Court's reliance on *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973) is mistaken. In *Whittaker*, as in *Burger King*, the defendant over whom personal jurisdiction was asserted had direct and active contacts with the forum state, and had in fact monitored performance of the resident manufacturer in producing the products in question. Thus, in no sense did Demoulas invoke the benefits and protections of Maine law regarding the manufacture and transport of the bakery goods in question. The finding of the Supreme Judicial Court to that effect, being based only upon the passive purchasing by Demoulas of Lepage bakery products, does not comport with the due process requirements articulated above.

Similarly, the Maine Supreme Judicial Court's reliance on the facts that the Respondents' doctors are located in Maine and that the Defendant would not be inconvenienced by litigating there is not controlling. Those factors are not relevant to determining the essential contacts between the Petitioner and the forum. As the Court in *World-Wide Volkswagen* noted:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. 444 U.S. at 294.

The Petitioner's contacts with the State of Maine do not constitute the kind of continuous and systematic general business contacts this Court found to exist in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) or *Burger King Corp., supra.* Rather, the Petitioner's contacts are much less compelling than the more extensive contacts which this Court held to be insufficient to allow an assertion of general jurisdiction in *Helicopteros Nacionales de Colombia v. Hall, supra.* It follows that the Petitioner's contacts with the State of Maine are insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment, and the Maine Court may not constitutionally assert jurisdiction over the Petitioner.

II. THE MAINE SUPREME JUDICIAL COURT INCORRECTLY RULED THAT THE CONTACTS OF THE PETITIONER WITH THE STATE OF MAINE WERE SUFFICIENT TO ALLOW A MAINE STATE COURT TO ASSERT SPECIFIC JURISDICTION OVER THE PETITIONER. SINCE THE RESPONDENTS' CAUSE OF ACTION NEITHER AROSE OUT OF NOR WAS RELATED TO THE PETITIONER'S ACTIVITIES WITH THE STATE, THERE MAY BE NO ASSERTION OF SPECIFIC JURISDICTION.

Seemingly acknowledging that Demoulas' contacts with the State of Maine were insufficient to assert "general jurisdiction" over the Petitioner, the Maine Supreme Judicial Court, citing *Keeton v. Hustler Magazine,* 465 U.S. at 780, granted specific jurisdiction because "less extensive activity is required where the cause of action arises out of or in connection with the Defendant's forum-related activity." The Court failed to discuss how it determined that the cause of action arose out of or was connected with the Defendant's forum-related activity.

In *Helicopteros Nacionales de Colombia v. Hall,* 466 U.S. 408, 104 S. Ct. 1984, this Court declined to address

the questions relating to the sort of contacts necessary for an assertion of "specific jurisdiction":

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationships differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction. 408 U.S. at 415-416, n. 10; 104 S. Ct. at 1873 n. 10.

This case squarely raises the issues not reached in *Helicopteros*. Moreover, the Maine Supreme Judicial Court's holding that the Petitioner's contacts with the forum state were sufficient to allow the courts of Maine to assert "specific jurisdiction" over the Petitioner violated the Due Process Clause of the Fourteenth Amendment because the underlying cause of action did not "arise out of" or "relate to" the Petitioner's activities in the forum.

This case arises from an accident which occurred at the Respondent's warehouse in Massachusetts. It is merely a premises liability claim arising out of the maintenance of specific premises in Massachusetts and has no direct relationship whatsover with the State of Maine. The Petitioner's only contacts with the State of Maine are that it contracted with Maine suppliers to fulfill its needs in Massachusetts. Existence of a contractual relationship with the Respondents' employer is not an element of the tort of negligence which gives rise to the Respondent's claim. The contract has no relation to the suit except for the attenuated fact that "but for" the

contract the Respondent would not have been in the Petitioner's warehouse. The Plaintiff's cause of action does not arise out of nor is it closely related to the contractual relationships as between the Petitioner and its Maine suppliers. Moreover, such contractual relationships have routinely been held to be insufficient to underlay an assertion of specific jurisdiction against a nonresident corporate defendant.

Perhaps the most exhaustive analysis of the issue is found in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979). In that case, the Seventh Circuit dealt with an attempted assertion of *in personam* jurisdiction over a nonresident defendant who was sued by a Wisconsin corporation in the United States District Court for the Eastern District of Wisconsin. The Defendant was a West Virginia corporation which contracted with a Wisconsin firm for the various structural assemblies for use on a dam project in Virginia. The Seventh Circuit held that merely contracting with a party in another state is not sufficient to support a claim of specific jurisdiction as against a nonresident corporate defendant. The Seventh Circuit noted:

> Although Mountain State in a sense caused the activity in Wisconsin by placing the order, the contract between the parties left Lakeside in absolute control over where it would conduct that activity, and it made this decision and conducted the activity unilaterally. Mountain State's belief, which we may assume existed, that Lakeside would choose to perform its contractual obligations in Wisconsin, does not constitute an invocation of the benefits and protections of Wisconsin's laws; Mountain State did not "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id. Cf. Shaffer v. Heitner, supra*, 433 U.S. at 216, 97 S. Ct. at 2586. Therefore the courts of Wisconsin no more had jurisdiction over Mountain State than would the

> courts of England or Taiwan if Lakeside had chosen to have the goods manufactured in either of those places. 597 F.2d at 603.

The Maine Supreme Judicial Court's attempted reliance upon the First Circuit decision in *Whittaker Corp. v. United Aircraft Corp.*, 382 F.2d 1079, 1984 (1st Cir. 1973) is misplaced. In that case, United Aircraft maintained an actual physical presence in Massachusetts and asserted substantial control over the manufacturing process by monitoring that process on site. No such activities have occurred in *Lakeside* or in the instant case. Indeed, the Seventh Circuit in *Lakeside* expressly distinguished *Whittaker* and held that it stood for the proposition that the performance of contractual obligations by a Plaintiff in a forum state is not sufficient in and of itself to confer jurisdiction over an out of state Defendant, at least when the contract does not require the Plaintiff to perform in the forum state. *Lakeside Bridge & Steel, supra*, 597 F.2d at 601. *See generally*, Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 S. Ct. Rev. 77, 88-97.

This analysis of the issues surrounding an assertion of specific jurisdiction addresses each of the functions that a minimal contacts test was held to perform in *World-Wide Volkswagen Corp. v. Wilson, supra*, 444 U.S. at 291-292. Such an analysis protects the Defendant against the burdens of litigating in a distant or inconvenient form. More importantly, however, such an analysis acts to insure that the states, through their courts, do not reach out beyond the limits imposed upon them by traditional theories of federalism. Such limits are especially important in a case such as this, which is essentially local in character, if the minimum contact test is "to ensure not only fairness but the orderly administration of the laws." *International Shoe Co. v. Washington*, 326 U.S. at 319; *World-Wide Volkswagen v. Woodson*, 444 U.S. at 294.

The Maine Supreme Judicial Court's assumption that a contractual relationship with Maine residents was sufficient to give rise to an assertion of specific jurisdiction contravened the limits imposed upon the states by the Due Process Clause. It necessarily follows that a finding of specific jurisdiction under the facts of the instant case is constitutionally impermissible, and the judgment of the Maine Supreme Judicial Court should therefore be reversed.

CONCLUSION

For the reasons set forth above, petitioner urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 5, 1987

APPENDIX

APPENDIX

SUPREME JUDICIAL COURT OF MAINE

LARRY HARRIMAN, *et al.*

v.

DEMOULAS SUPERMARKETS, INC.

Argued Nov. 5, 1986

Decided Dec. 5, 1986

Dionne & Crotteau, Paul R. Dionne (orally), Lewiston, for plaintiff.

Hunt, Thompson & Bowie, James M. Bowie (orally), Portland, for defendant.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, GLASSMAN and CLIFFORD, JJ.

McKUSICK, Chief Justice.

In this action brought in the Superior Court (Androscoggin County) Larry Harriman and his wife, residents of Auburn, Maine, sued Demoulas Supermarkets, Inc., a Massachusetts corporation that operates grocery stores only in Massachusetts and New Hampshire, seeking damages for personal injuries suffered by Mr. Harriman while engaged in delivering baked goods for his Maine employer to a Demoulas warehouse in Massachusetts. The single issue before the Superior Court, which dismissed the action for want of personal jurisdiction over

Demoulas, was, as it is here on appeal, whether in the factual circumstances here presented the Maine Superior Court may take jurisdiction in this action, consistently with the due process restrictions of the United States Constitution. On appeal we answer that question in the affirmative, and we therefore vacate the Supreme Court's dismissal of the action.

I.

Plaintiff Larry Harriman was employed as a tractor-trailer operator by F.R. Lepage, Inc., a Maine corporation operating a bakery located in Auburn. On August 26, 1979, in the course of his employment with Lepage, Mr. Harriman delivered baked goods to the Tewksbury, Massachusetts, warehouse of defendant Demoulas. As he was unloading baked goods from his truck, Mr. Harriman slipped and fell on Demoulas's loading platform. Mr. Harriman sustained severe injuries to his back that have required extensive medical treatment and have prevented his return to work. Mr. Harriman has received all his medical treatment in Lewiston, Maine.

Demoulas operates a chain of 35 supermarkets in New Hampshire and Massachusetts, for which it purchases supplies from several Maine companies, including Lepage. Demoulas has conducted business with Lepage continuously for twelve years under an oral agreement. Pursuant to that agreement LePage delivers baked goods to 34 Demoulas stores five times a week and in payment receives weekly checks mailed by Demoulas from Massachusetts to Lepage's Auburn, Maine, office. Also, at Demoulas's direction Lepage uses Demoulas's private labels, "Market Basket" and "Farm Valley," to package a portion of the Lepage baked goods that Demoulas orders. Demoulas's annual gross purchases of Lepage baked goods, under Lepage's own label and under Demoulas's private labels, exceed half a million dollars. Under a similar agreement with Harris Baking Company, another bakery located in Maine, Demoulas

purchases in excess of $100,000 of baked goods a year. Those two Maine bakeries supply about 40% of the baked goods that Demoulas sells at retail. Representatives of Lepage and Harris conduct business with representatives of Demoulas on a weekly basis in person at Demoulas's main office in Massachusetts, as well as by telephone and mail.

Demoulas has developed a market in southern Maine for the sale of its goods to Maine residents from its New Hampshire stores close to the Maine line. Demoulas advertises in six Massachusetts and New Hampshire newspapers that have circulations in Maine. It also advertises in the York County Coast Star published in Kennebunk, Maine, and on four radio stations whose signals reach Maine. Demoulas attracts from Maine 10% to 20% of the customers patronizing its Dover, New Hampshire, store, and about half of the customers at its Portsmouth store.

II.

Under the Maine long arm statute, 14 M.R.S.A. § 704-A (1980),[1] the jurisdictional reach of Maine courts is coextensive with the permissible exercise of personal jurisdiction under the due process clause of the federal constitution. *See Tyson v. Whitaker & Son*, 407 A.2d 1, 3 (Me.1979); *Labbe v. Nissen Corp.*, 404 A.2d 564, 569 (Me.1979). To decide that due process permits Maine's assertion of personal jurisdiction over Demoulas, we must affirmatively answer three questions:

---

[1] 14 M.R.S.A. § 704-A provides in pertinent part:

> 2. Causes of action. Any person, whether or not a citizen or resident of this State, who in person or through an agent . . .
>
> * * * *
>
> I. Maintain[s] any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

> (1) does the forum state have a legitimate interest in the subject matter of the action; (2) should the defendant by his conduct reasonably have anticipated litigation in the forum state; and (3) would the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice"?

Foreside Common Development Corp. v. Bleisch, 463 A.2d 767, 769 (Me. 1983).

First, Maine does have a legitimate interest in this litigation. Maine has an interest in providing the Harrimans, Maine citizens, a means of redress against nonresidents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 541 (1985); *Labbe v. Nissen Corp.*, 404 A.2d at 573; 14 M.R.S.A. § 704-A(1) ("declaration of purpose" for Maine's long-arm statute). Maine has an interest in this litigation because of its concern for the safety of Maine workers engaged in activities in the course of trade that is essential to Maine's economy. Finally, Maine has an interest in this litigation because all of Mr. Harriman's medical treatment took place in Lewiston; thus, all of his medical witnesses and medical creditors are located in Maine. The effects of his injury are felt in Maine. *Labbe v. Nissen Corp.*, 404 A.2d at 572.

Second, Demoulas should reasonably have anticipated litigation in Maine because it purposefully and continuously directed both purchasing and sales activities at Maine businesses and residents. For a corporation to be subject to the forum State's jurisdiction, due process demands that the corporation have sufficient contacts with that State to "make it reasonable . . . to require the corporation to defend the particular suit which is brought there." *International Shoe Co. v. Washington*, 326 U.S. 310, 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). To meet that reasonableness test the defendant's contacts with the forum State must be more

than merely "random," "fortuitous," or "attenuated," *Keeton v. Hustler Magazine*, 465 U.S. 770, 773-74, 104 S.Ct. 1473, 1477-78, 79 L.Ed.2d 790 (1984), and must not result solely from the "unilateral activity of another party," *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 1874, 80 L.Ed.2d 404 (1983). The defendant must not be unfairly surprised by being haled into court in that jurisdiction.[2] *See Burger King Corp. v. Rudzewicz*, 471 U.S. at 471-74, 105 S.Ct. at 2181-83, 85 L.Ed.2d at 540-42. Whether the required minimum contacts are found

> "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Id. (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958)). When a defendant "purposefully directs his activities at residents of a forum" by "deliberately engaging in significant activities" in that forum or by "creating continuing obligations between himself and residents" of the forum, that requirement is met. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 473-75, 105 S.Ct. at 2182-84, 85 L.Ed.2d 541-43.

Demoulas's conduct in entering into and maintaining its long-standing contractual relationships for the purchase of grocery products from Lepage and other Maine businesses provided sufficient basis upon which to assert

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[2] A defendant who can foresee being haled into court in a particular forum has the opportunity to "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

jurisdiction. The United States Supreme Court has stated in *Burger King* that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." 85 L.Ed.2d at 541 (citations omitted). Demoulas's purchase of goods from Lepage was not simply an isolated event such as that involved in *Architectural Woodcraft Co. v. Read*, 464 A.2d 210 (Me. 1983) (court denied jurisdiction over a California purchaser of a single staircase handcrafted by a Maine company). The twelve-year history of the oral agreement and continuous business relationship and the substantial volume of business transacted every week between Lepage and Demoulas support assertion of jurisdiction in Lepage's home state. The ongoing business relationship between Demoulas and Lepage was not the result of unilateral action by Lepage; presumably both parties to the agreement made demands and accommodations over time as their needs changed. In particular, the fact that Demoulas directed three Maine companies to attach its private labels to their goods demonstrates purposeful involvement by Demoulas in this State. By causing Lepage to label baked goods in Maine with Demoulas's "Farm Valley" and "Market Basket" labels, Demoulas implicitly undertook responsibility for the quality of the manufacture of those goods. Demoulas thus gained the right to exercise some control over production of the goods labeled with its private labels in Maine. *See Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079, 1084 (1st Cir. 1973) (Massachusetts federal district court had personal jurisdiction over nonresident purchaser who monitored performance of resident manufacturer). Demoulas entered into its relationships with Maine suppliers for profit. By continuously using Maine bakeries instead of their Massachusetts and New Hampshire competitors for over

$600,000 worth of goods per year and 40% of its baked goods requirements, Demoulas invoked the benefits and protections of Maine law regarding the manufacture and the transport of those goods. Demoulas's purchasing activity directed at Maine suppliers was purposeful and sustained, not "random," "fortuitous," or "attenuated."

Likewise, Demoulas's sales promotion activities directed at Maine customers were purposeful, substantial, and successful, not "random," "fortuitous," or "attenuated." Although its Portsmouth store happens to be situated on the New Hampshire side of the state line, the market population served by that store is about equally divided between Maine and New Hampshire. At its Dover supermarket Demoulas through advertising and promotions attracts up to a fifth of its customers from Maine. By advertising in at least one Maine newspaper and on at least four radio stations serving Maine listeners, Demoulas induces Maine customers to do their grocery shopping at stores across the New Hampshire border. By conducting these sales activities, Demoulas has invoked the benefits and protections of Maine law; therefore, in respect to its sales as well as its purchases, "defendant's conduct and connection with the forum State are such that [it] should have reasonably anticipate[d] being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Third, to subject Demoulas to the jurisdiction of Maine courts comports with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 320, 66 S.Ct. at 160. The determination of fairness depends upon the facts of each case. *Tyson v. Whitaker & Son*, 407 A.2d at 6. For that determination, the court considers "a variety of factors including the nature and purpose of defendant's contacts with the forum state, the connection between the contacts and the cause of action, the number of contacts, the interest of the forum

state in the controversy, and the convenience and fairness to both parties." *Labbe v. Nissen Corp.*, 404 A.2d at 570. As we have discussed above, the nature, purpose, and number of contacts and the interest of the forum state in the controversy all support jurisdiction. The connection between Demoulas's contacts with Maine and the Harrimans' cause of action also supports assertion of jurisdiction by Maine. If a nonresident corporation's activities are wide-ranging, continuous, and systematic, it may be subject to jurisdiction in a State on a cause of action unrelated to those activities. *See Perkins v. Benguet Mining Co.*, 342 U.S. 437, 447-48, 72 S.Ct. 413, 419, 96 L.Ed. 485 (1952); *International Shoe*, 326 U.S. at 318, 66 S.Ct. at 159. Less extensive activity is required where the cause of action arises out of or in connection with the defendant's forum-related activity. *See Keeton v. Hustler Magazine*, 465 U.S. at 780, 104 S.Ct. at 1485. The case at bar involves the latter situation. The accident giving rise to the present cause of action occurred while Mr. Harriman was delivering Maine goods to Demoulas's premises in performance of his Maine employer's contractual obligations to Demoulas.

Furthermore, Demoulas has failed to convince us that considerations of "the fairness and convenience to both parties" render jurisdiction unreasonable.

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King Corp. v. Rudzewicz, 471 U.S. at 477, 105 S.Ct. at 2185, 85 L.Ed.2d at 544. Demoulas made no attempt to demonstrate that it would be significantly more inconvenienced by being required to appear and defend in Maine rather than in Massachusetts. *See Labbe v. Nissen Corp.*, 404 A.2d at 572. The relative economic burdens favor the Harrimans' choice of forum.

The Harrimans' medical witnesses are all in Maine, and it would be expensive to transport them to Massachusetts or to obtain their testimony there through alternative means. Demoulas is better able to absorb the cost of litigation into its costs of doing business. *See Tyson v. Whitaker & Son*, 407 A.2d at 6.

By establishing extensive, long-term business relationships with Maine suppliers, some of whom at its direction use the Demoulas private labels, and by advertising in Maine to attract Maine customers, Demoulas invoked the benefits and protections of Maine law. These purposeful activities provided Demoulas reasonable notice of the probability of being haled into court in Maine. Maine's assertion of jurisdiction to provide redress for its citizens in these circumstances does not offend due process.

The entry is:

Judgment of dismissal vacated.

All concurring.

STATE OF MAINE
ANDROSCOGGIN, SS

SUPERIOR COURT

Civil Action Docket No. CV-82-318

LARRY HARRIMAN, *et al.*,
Plaintiffs

v.

DEMOULAS SUPERMARKETS, INC.,
Defendant

[Filed Mar. 26, 1986]

ORDER

The defendant has moved to dismiss the complaint for lack of personal jurisdiction pursuant to M.R. Civ. P. 12(b)(2). Matters outside the pleadings have been submitted and considered. Because the defendant's contacts with Maine are insufficient to allow this court to assert jurisdiction over the defendant consistent with due process, the complaint must be dismissed.

The defendant, a Massachusetts corporation with its principal place of business in Massachusetts, operates a chain of supermarkets in Massachusetts and New Hampshire. The plaintiffs are residents of Maine. The plaintiff Larry Harriman was employed by F.R. Lepage Bakery, a Maine Corporation, as a tractor-trailer truck operator. The plaintiff alleges that on August 26, 1979, while unloading some Lepage baked goods at the defend-

ant's Tewksbury, Massachusetts warehouse, he was injured through the defendant's negligence.

Under Maine's long-arm statute, 14 M.R.S.A. § 704-A, the statutory exercise of personal jurisdiction is coextensive with that which is permissible under the due process clause of the federal constitution. *E.g., Foreside Common Development Corp. v. Bleisch*, 463 A.2d 767, 769 (Me. 1983). The same is true of the "doing business" statute, 13-A M.R.S.A. § 1213. *Labbe v. Nissen Corp.*, 404 A.2d 564, 569 (Me. 1979). The due process issue is whether the defendant's "conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there." *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *See, e.g., Foreside Common Development*, 463 A.2d at 769. Resolution of the question depends on the facts of each case. However, "a nonresident defendant's purposeful availment of the privilege of conducting activities in the forum state [is] critical in determining whether jurisdiction [can] be exercised. . . . Only through purposeful availment of a forum state's benefits does a defendant have reasonable notice consonant with due process that he is subject to the forum's jurisdiction." *Foreside Common Development*, 463 A.2d at 769.

The defendant's contacts with Maine center around its contracts with Lepage and some other Maine companies as suppliers of goods it retails. The defendant buys a significant amount of goods from Maine companies, some of which are sold under the defendant's private labels. The defendant also has advertised in a Maine newspaper, the York County Star.

On the other hand, the defendant is not authorized to do business in Maine. It has no office, agent, property, telephone, bank accounts, etc. in Maine. The defendant has never before been involved in a lawsuit in Maine. No agent of the defendant has ever come to Maine.

The defendant apparently plays a passive part in its contracts with Maine suppliers. All face to face contact with Maine suppliers occurs in Massachusetts. The defendant does not solicit business from Lepage and the other suppliers. The suppliers bring their goods to the defendant's warehouse and service the individual stores; this is what Larry Harriman was doing when he was injured. The defendant, in essence, merely makes space available for the goods and pays for them. Although it has continuously purchased goods from Maine suppliers for years, the contracts are apparently oral and terminable at will.

The defendant has substantial contact with Maine companies. However, the defendant has little purposeful contact with Maine itself. It is the defendant's contacts with Maine, as a state, not with Maine residents, that determine whether the exercise of jurisdiction is appropriate. *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir. 1982). The fact that Lepage and other suppliers were located in Maine rather than, *e.g.*, New Hampshire or Vermont, was incidental and irrelevant to the contracts. *Id.* at 655-56. Although not determinative, even the alleged tort occurred in Massachusetts, not Maine. The suppliers' unilateral performance in Maine is insufficient to support jurisdiction over the defendant. *Id.* at 655. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The defendant simply has not "purposefully avail[ed] itself of the privilege of *conducting activities within* [*Maine*], thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253 (emphasis added.) *Accord*: *Mountaire Feeds*, 677 F.2d 651; *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. den.* 445 U.S. 907 (1980); *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973). *See Cives Corp. v. American Elec. Power Co.*, 550 F. Supp. 1155 (D. Me. 1982). *See also, e.g., Architectuarl Woodcraft Co. v. Read*, 464 A.2d 210 (Me. 1983).

For the foregoing reasons, defendant's motion to dismiss is granted.

The entry will be: Defendant's motion to dismiss for lack of jurisdiction is granted. The complaint is dismissed.

Dated: March 25, 1986

/s/ T. E. Delahanty
THOMAS E. DELAHANTY II
Justice
Superior Court

A TRUE COPY

/s/ Sally A. Baurget

ATTEST